

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NEW JERSEY

BESLER & COMPANY, INC.,  
3 Independence Way, Suite 201  
Princeton, NJ 08540,

Plaintiff,

V.

Civil Action

KATHLEEN SEBELIUS, Secretary,  
Department of Health and Human  
Services,  
220 Independence Ave, S.W.  
Washington, D.C., 20201,

PROVIDER REIMBURSEMENT REVIEW  
BOARD,  
2520 Lord Baltimore Avenue, Suite L  
Baltimore, MD 21244,

Defendants.

## COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

Plaintiff Besler & Company, Inc., (“Besler”) brings this action against Defendant Kathleen Sebelius, in her official capacity as Secretary of the United States Department of Health & Human Services (the “Secretary”), and the Provider Reimbursement Review Board (“PRRB”) to compel compliance with the Freedom of Information Act, 5 U.S.C. § 552, (“FOIA”).

## JURISDICTION AND VENUE

1. This Court has both subject matter over this action and personal jurisdiction over the parties pursuant to 5 U.S.C. § 552(a)(4)(B) and 28 U.S.C. § 1331. Venue lies in this judicial district under 5 U.S.C. § 552(a)(4)(B).

### **PARTIES**

2. Besler is a business corporation organized under the laws of the State of New Jersey, doing business as BESLER Consulting, and with its principal place of business at 3 Independence Way, Suite 201, Princeton, New Jersey 08540. Besler provides financial and operational consultancy to hospitals and other healthcare providers.

3. Defendant Kathleen Sebelius is the Secretary of the Department of Health and Human Services ("HHS"), a Department of the Executive Branch of the United States Government. HHS is an agency within the meaning of 5 U.S.C. § 552(f).

4. Defendant PRRB is a board established by the Secretary pursuant to statute. The PRRB is authorized to hear appeals by certain healthcare providers, including acute care hospitals, of certain Medicare payment determinations.

### **THE PRRB APPEAL PROCESS**

5. Part A of the Medicare Act, 42 U.S.C. §§ 1395c-1395i-4, provides payment for "inpatient hospital services" furnished by participating "providers of services," including short-term, acute care hospitals. 42 U.S.C. § 1395d(a)(1).

6. Medicare payments to hospitals are determined by fiscal intermediaries that contract with the Centers for Medicare & Medicaid Services ("CMS") under 42 U.S.C. § 1395h.

7. CMS is a division of HHS and is responsible for overseeing the Medicare and Medicaid programs.

8. After the close of a hospital fiscal year, the intermediary analyzes a cost report prepared by the hospital and issues a Notice of Program Reimbursement ("NPR") that notifies the hospital of the intermediary's final determination of the hospital's Medicare reimbursement for the fiscal year. *See In re Medicare Reimbursement*

*Litig., Baystate Health Systems v. Leavitt*, 309 F. Supp. 2d 89, 92 (D.D.C. 2004), *aff'd* 414 F.3d 7 (D.C. Cir. 2005). *See also* 42 C.F.R. § 405.1803.

9. The PRRB is an administrative tribunal appointed by the Secretary. 42 U.S.C. § 1395oo(h).

10. A hospital may appeal to the PRRB if the hospital is dissatisfied with an intermediary's determination in an NPR as to the amount of Medicare payment due the hospital for a cost reporting period. 42 U.S.C. § 1395oo(a); 42 C.F.R. § 405.1835.

11. The final decision of the PRRB is subject to review by the Administrator of CMS pursuant to delegation of authority by the Secretary to the Administrator. *See* 42 U.S.C. § 1395oo(f); 42 C.F.R. § 405.1875.

12. The Secretary's final decision, as set forth either in the decision of the Board or of the Administrator, may be reviewed in a civil action before this Court. 42 U.S.C. § 1395oo(f).

13. The PRRB "must maintain a complete record of all proceedings in each appeal." 42 C.F.R. § 405.1865(a)(1).

14. No confidential information is included in the PRRB record. PRRB Rule 27.6.H., captioned "Confidential Information," provides as follows:

Because the record in Board proceedings may be disclosed to the public, the parties must carefully review their documents to ensure that they do not contain patient names, health insurance or social security numbers, or other information that identifies individuals.

1. If the parties need to include materials with patient names, numbers, or other identifying information, they must redact (untraceably remove) the names and numbers and replace them with non-identifying sequential numbers. If the confidential information itself is necessary to support your position, submit a sealed envelope containing the confidential information with a cross reference to the non-identifying sequential numbers.

### **BESLER'S FOIA REQUESTS**

15. As part of its regular business services, Besler assists healthcare providers with Medicare reimbursement matters, including the filing and prosecution of appeals before the PRRB. To perform its services properly, and to ensure the healthcare providers Besler serves and seeks to serve are properly represented, Besler requires access to certain public documents and information in the possession of the defendants.

16. By letter dated January 30, 2012, Besler made its first FOIA request to defendants ("the January FOIA request"). Besler requested certain documents filed with the PRRB by short-term, acute care hospitals. The request was limited to documents filed within a specific time period (between October 1, 2011 and December 31, 2011, inclusive). In sum, the documents requested related to new appeals filed before the PRRB, documents adding issues to already pending appeals, requests for Expedited Judicial Review filed during the time-period. Besler also request documents related to any compilation or "master tracking sheet" (or any similar type of document) that tracks existing group appeals pending before the PRRB.

17. By letter dated February 8, 2012, CMS acknowledged receipt of the January FOIA request.

18. By letter dated April 10, 2012, Besler made its second FOIA request to defendants ("the April FOIA request"). The letter requested the same documents as the January FOIA request, except that the April FOIA request related to the time period January 1, 2012 to March 31, 2012, inclusive.

19. By letter dated May 9, 2012, CMS acknowledged receipt of the April FOIA request.

20. By letter dated July 2, 2012, Besler made its third FOIA request to defendants ("the July FOIA request"). The letter requested the same documents as the

prior FOIA requests, except that the July FOIA request related to the time period April 1, 2012 to June 30, 2012, inclusive.

21. By letter dated July 20, 2012, CMS acknowledged receipt of the July FOIA request.

22. By letter dated October 1, 2012, Besler made its fourth FOIA request to defendants (“the October FOIA request”). The letter requested the same documents as the prior FOIA requests, except that the October FOIA request related to the time period July 1, 2012 to September 30, 2012, inclusive.

23. By letter dated October 5, 2012, CMS acknowledged receipt of the October FOIA request.

24. As of the date of this Complaint, defendants have not provided any documents responsive to Besler’s FOIA requests or demonstrated that responsive documents are exempt from production. Defendants have not indicated whether or when any responsive documents will be produced. In short, Defendants have failed to respond to the requests in any manner other than a cursory acknowledgement of receipt of the requests.

25. Because defendants failed to comply with the time limit set forth in 5 U.S.C. § 552(a)(6)(A), Besler is deemed to have exhausted any and all administrative remedies with respect to the FOIA requests, pursuant to 5 U.S.C. § 552(a)(6)(C).

**COUNT 1**  
**(Violation of FOIA, 5 U.S.C. § 552)**

26. Besler realleges paragraphs 1 through 25 as if fully stated herein.

27. Defendants are unlawfully withholding records requested by Besler pursuant to 5 U.S.C. § 552.

28. Besler is being irreparably harmed by Defendants' unlawful withholding of the requested records, and Besler will continue to be irreparably harmed unless Defendants are compelled to conform their conduct to the requirements of the law.

**REQUEST FOR RELIEF**

WHEREFORE, Besler respectfully requests that the Court:

- (1) order Defendants to provide immediately to Besler all records responsive to Besler's FOIA requests;
- (2) enjoin Defendants from further violations of FOIA in response to Besler's requests for PRRB documents;
- (3) grant Besler pursuant to 5 U.S.C. § 552(a)(4)(E) an award of attorneys' fees and other litigation costs reasonably incurred in this action; and
- (4) grant Besler such other relief as the Court deems just and proper.

Dated: March 1, 2013

Respectfully submitted,

**THE LAW OFFICE OF JOSEPH D. GLAZER, P.C.**

s/ Joseph D. Glazer

Joseph D. Glazer  
Bar No. JG7968

116 Village Boulevard, Suite 200  
Princeton, New Jersey 08540  
Telephone: (609) 951-2262  
Facsimile: (609) 951-2263  
jdg@jdglaizerlaw.com  
Counsel for Plaintiff